EON Bank Bhd v The Official Assignee of the Property of Sia Ti Hua, Bankrupt

HIGH COURT (KUCHING) — ORIGINATING MOTION NO 25-06 OF 1997
MUHAMMAD KAMIL J
17 NOVEMBER 1997

Bankruptcy *— Proof and priority of debts — Proof of debt without judgment — Judgment was set aside — Whether claim was extinguished — Whether Official Assignee's rejection of proof of the debt valid — Bankruptcy Act 1967 s 40*

The applicant, EON Bank Bhd, appealed against the decision of the Official Assignee who rejected the proof of debt of RM494,495.77 against the estate of the bankrupt. The bankrupt had guaranteed the payment of two loans granted by the applicant to a third party, Dai Tai Enterprise Sdn Bhd of which the bankrupt was a director. The company defaulted in the payment of the loans and the applicant sued the bankrupt on the guarantee in an effort to obtain payment of the loans. Judgment was obtained against the bankrupt on 9 February 1989 and was subsequently set aside on 4 December 1994. On 24 September 1992 an adjudication order and receiving order were granted against the bankrupt on a petition filed by United Malayan Banking Corp, and the applicant lodged its proof of debt against the estate of the bankrupt, in respect of RM499,689.79, for judgment interest in Suit M/CIV/1229/87/B for RM5,193.97 and S/KG 72/1198 for RM494,495.77. The Official Assignee acknowledged the proof of debt in respect of RM5,193.97 but rejected the claim of RM494,495.77 because the judgment debt had been set aside.

Held, allowing the application:

In the instant case, the Official Assignee should not have rejected the claim of RM494,495.77 against the bankrupt's estate. The debt to the applicant by the bankrupt was a present debt to which the debtor was subject at the date of the receiving order. Even without a judgment, a creditor always has the right to prove against a debtor on his guarantee. It was a provable debt under s 40 of the Bankruptcy Act 1967. Although the judgment was in respect of a claim of RM494,495.77 that had been set aside, the claim was not extinguished, it remained. It was therefore not a valid ground for the rejection of proof of the debt (see p 672F–I).

[Bahasa Malaysia summary

Pemohon, EON Bank Bhd, merayu terhadap keputusan Pegawai Penerima yang telah menolak bukti hutang sebanyak RM494,495.77 terhadap harta si bankrap. Si bankrap telah menjamin bayaran dua pinjaman yang diberikan oleh pemohon kepada suatu pihak ketiga, Dai Tai Enterprise Sdn Bhd yang mana si bankrap adalah seorang pengarah. Syarikat itu telah ingkar dalam bayaran pinjaman dan pemohon mendakwa si bankrap atas gerenti dalam usaha untuk

mendapatkan bayaran pinjaman. Penghakiman telah diperolehi terhadap si bankrap pada 9 Februari 1989 dan berikutnya diketepikan pada 4 Disember 1994. Pada 24 September 1992 suatu perintah penghukuman dan perintah penerimaan telah diberikan terhadap si bankrap atas satu petisyen yang difailkan oleh United Malayan Banking Corp, dan pemohon mengemukakan bukti hutangnya terhadap harta si bankrap, berkenaan dengan RM499,689.79, untuk faedah penghakiman dalam Guaman M/CIV/1229/87/B sebanyak RM5,193.97 dan S/KG 72/1198 untuk RM494,495.77. Pegawai Penerima mengakui bukti hutang berkenaan jumlah RM5,193.97 tetapi menolak tuntutan RM494,495.77 kerana hutang penghakiman telah diketepikan.

Diputuskan, membenarkan permohonan:

Dalam kes ini, Pegawai Penerima tidak patut menolak tuntutan sebanyak RM494,495.77 terhadap harta si bankrap. Hutang kepada pemohon oleh si bankrap merupakan suatu hutang 'present' yang mana penghutang adalah tertakluk pada tarikh perintah penerimaan. Biarpun tiada penghakiman, si piutang sentiasa berhak membukti terhadap penghutang atas gerentinya. Ia merupakan suatu hutang yang kena dibuktikan di bawah s 40 Akta Kebankrapan 1967. Walaupun penghakiman adalah berkenaan tuntutan untuk RM494,495.77 yang telah diketepikan, tuntutan itu tidak dihapuskan, ia tetap kekal. Maka ia bukanlah alasan yang sah untuk menolak bukti hutang itu (lihat ms 672F–I).]

Notes

For cases on proof and priority of debts, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1568–1580.

Cases referred to

Brandon v McHenry [1891] 1 QB 538 (refd)
Esa bin Sa'yon v Woon Kim Poh & Anor [1985] 2 CLJ 382 (refd)
John v Mendoza [1939] 1 KB 141 (refd)
More v More [1962] 1 Ch 424; [1962] 1 All ER 125 (refd)
Vilvanathan v Official Assignee [1970] 1 MLJ 237 (refd)

Legislation referred to

Bankruptcy Act 1967 s 40, 40(3), Schedule C r 26

Stephanie Chin (*Chew, Jugah, Wan Ullok & Co*) for the applicant.
Ko Fui Loong (Official Assignee's Office, Kuching) for the respondent.

Cur Adv Vult

Muhammad Kamil J: The applicant, EON Bank Bhd, appealed against the decision of the Official Assignee who rejected the proof of debt of RM494,495.77 against the estate of the bankrupt.

A In the instant case, the bankrupt had guaranteed the payment of two loans granted by the applicant to a third party, Dai Tai Enterprise Sdn Bhd of which the bankrupt was a director. The company defaulted in payment of the loans and the applicant sued the bankrupt on the guarantee in an effort to obtain payment of the loans as promised by the bankrupt.

B Judgment was obtained against the bankrupt on 9 February 1989 and was set aside on 4 December 1996. On 24 September 1992, an adjudication order and receiving order were granted against the bankrupt on a petition filed by United Malayan Banking Corp, and the applicant lodged its proof of debt against the estate of the bankrupt, in respect of RM499,689.74, for judgment interest in Suit M/CIV/1229/87/B for C RM5,193.97, and S/KG 72/1988 for RM494,495.77. The proof of debt was registered by the Official Assignee as No 36–94 dated 28 January 1994. Subsequently, the Official Assignee acknowledged the proof of debt in respect of RM5,193.97 but rejected the claim of RM494,495.77 because the judgment debt had been set aside.

D The applicant submitted that under r 26 Schedule C of the Bankruptcy Act 1967 ('the Act'), the Official Assignee could not admit part of the claim and reject the other part; it was wrong in law to do so. The Official Assignee in reply submitted that the reason for the rejection of proof of the debt of RM494,495.77 was that the bankrupt had disputed the amount and the judgment had been set aside.

E Under r 26 Schedule C of the Act, on the admission or rejection of proof, it is stated:

> The Official Assignee shall examine every proof and the grounds of the debt, and in writing admit or reject it whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the F creditor the grounds of the rejection.

It seems clear that the claim of the applicant is a provable debt under s 40(3) of the Act. In 3(2) *Halsbury's Laws of England* (4th Ed), para 493 states:

G > *Creditor's right of proof against surety.* A creditor may prove against the estate of a bankrupt surety on his guarantee. However, he must establish the surety's liability, and, in the absence of agreement, it cannot be done merely by showing that the debtor had admitted the debt, and that judgment for it has been signed against him.

H Learned counsel for the applicant submitted that the effect of an annulment order by the court would enable the bankrupt to contract more debts and the applicant is estopped to bring a claim against the estate.

An annulment order made on the ground that all the debts have been paid in full creates an estoppel by record, so that a creditor cannot recover a debt for which he agreed to prove: *John v Mendoza* [1939] 1 KB 141, but I does not debar a creditor — who has merely abstained from proving — from suing the debtor after the annulment, his right to sue no longer being suspended by the bankruptcy: *More v More* [1962] 1 Ch 424; [1962] 1 All ER 125.

In *More v More*, the court declined to follow *John v Mendoza*, and followed *Brandon v McHenry* [1891] 1 QB 538 (CA), where a judgment had been signed by consent for the amount of an alleged simple contract debt and the judgment debtor being adjudicated bankrupt, the judgment creditor claimed in the bankruptcy. The trustee in bankruptcy rejected his proof on the ground that there was no debt due and he did not appeal. The bankruptcy was subsequently annulled on the ground that all the creditors who had proved in the bankruptcy and whose claim had been admitted had either been paid or satisfied in respect of their claims or consented to the annulment. It was held that the judgment creditor could not enforce the judgment after the annulment of the bankruptcy. His Lordship Lord Esher MR said at p 542:

> ... there is a claim in the bankruptcy; it is rejected by the trustees; and there is no appeal against their decision. Afterwards the bankruptcy is annulled. What, then, is the effect of the annulment? The 81st section of the Bankruptcy Act 1869 provided that, 'whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property, and payments duly made, and all acts theretofore done by the trustee or any person acting under his authority, or by the Court, shall be valid'. It seems to me that the rejection of a claim by the trustee is an act done by him within the meaning of the section, and therefore such rejection holds good after the annulment of the bankruptcy. If that is so, the claim so rejected cannot be enforced after the bankruptcy is annulled. It is not necessary to decide whether the judgment could be set aside. It appears to me clear that no step to enforce it can be taken under the circumstances that exist.

The principle is followed in *Vilvanathan v Official Assignee* [1970] 1 MLJ 237.

In the instant case, the Official Assignee should not have rejected the claim of RM494,495.77 against the bankrupt's estate. Learned counsel submitted that this debt has not been disputed by the Official Assignee, nor has it been disputed by the affidavit of Wong on behalf of the applicant setting out the guarantee, the demand thereon and the amount. If contentious allegations are made in the affidavit of one party, then those allegations are taken as admitted if they are not traversed in the affidavit of the other (see *Esa bin Sa'yon v Woon Kim Poh & Anor* [1985] 2 CLJ 382). It appears that the debt to the applicant by the bankrupt is a present debt to which the debtor is subject at the date of the receiving order. Even without a judgment, a creditor always has the right to prove against a debtor on his guarantee. In 3(2) *Halsbury's Laws of England*, para 493, it says that:

> A creditor may prove against the estate of a bankrupt surety on his guarantee.

In my view, it is a provable debt under s 40 of the Act. Although the judgment is in respect of the claim of RM494,495.77 that had been set aside, the claim is not extinguished, it remains. It is therefore not a valid ground for the rejection of proof of the debt in this case.

In the result, the application is allowed.

Application allowed.

Reported by Eugene Lee Hong Whye